Supreme Court, U.S.
FILED
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No. 97-1276

In The
Supreme Court of the United States
October Term, 1997

JOSEPH D. JONES,
Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent,

Petition for Writ Of Certiorari
To The United States Court Of Appeal
For The District of Columbia

SUPPLEMENTAL APPENDIX

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43 pp

Appendix D

Federal Communications Commission
FCC 96-372

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of	)	
	)	
KOLA, INC.,	)	
Assignor,	)	**File No.**
	)	**BALH-940513EC**
and	)	
	)	
RAY M. STANFIELD,	)	
RECEIVER,	)	
Assignee.	)	
	)	**File No.**
RAY M. STANFIELD,	)	**BAL-940706GP**
RECEIVER,	)	
Assignor,	)	
	)	
and	)	
	)	
INLAND EMPIRE	)	
BROADCASTING CORPORATION	)	
Assignee.	)	
	)	
For Assignment of the	)	
License of Radio Station	)	
KOLA(FM), San Bernardino,	)	
California	)	

MEMORANDUM OPINION AND ORDER

Adopted: Sept. 5, 1996 Rel: Oct. 25, 1996

By the Commission:

1. The Commission has under consideration the Letter of the Chief, Mass Media Bureau to Joseph D. Jones, et al, dated June 29, 1995 (hereafter the "Letter Decision'), denying a Petition for Reconsideration filed by Joseph D. Jones ("Jones") of the grant of a pro forma assignment of the license of Station KOLA (FM), San Bernardino, California, from KOLA, Inc. ("KOLAI"), to Ray M. Stanfield, Receiver ("Stanfield"). The Letter Decision also denied a Petition to Deny filed by Jones with respect to a subsequent application to assign the KOLA(FM) license from Stanfield to Inland Empire Broadcasting Corporation ("Inland"), and granted the Inland assignment application. Now before the Commission are a "Petition for Administrative Review"[1] filed by Jones on August 7, 1995, with respect to that

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[1] Although labeled as "Petition for Administrative Review," Jones's pleading appears to seek Commission review, pursuant to Section 1.115 of the rules, of the Bureau's denial of reconsideration of the grant to Stanfield. The initial grant of the assignment of license from KOLA, Inc. to Stanfield as Receiver (a Form 316) application) was not opposed by Jones. Jones subsequently filed a Petition for Reconsideration of that grant on July 25, 1994, within 30 days of the public notice of the grant. Although the assignment application also sought authority for the assignment of KOLAI's other station, KMET(AM), Banning, California, from KOLAI to Stanfield, Jones did not seek reconsideration of the assignment of KME to Stanfield.

portion of the Letter Decision denying his Petition for Reconsideration of the grant of the pro forma assignment of KOLA(FM) from KOLAI to Stanfield,[2] and a separate "Petition for Reconsideration" filed by

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[2] Also before the Commission with respect to the "Petition for Administrative Review: are a "Petition for Administrative Review (Revised)" filed by Jones on August 10, 1995; an "Opposition to 'Petition for Administrative Review' filed by Stanfield on August 24, 1995; a "Reply to Petition for Administrative Review" filed by Jones on September 26, 1995, and a pleadentitled "Additional Evidence" filed by Jones on November 3, 1995. Jones's August 10, 1995, "Petition for Administrative Review (Revised)" and November 3, 1995, "Additional Evidence" pleadings are hereby dismissed without consideration for the following reasons. With respect first to the Petition for Administrative Review (Revised), Section 1.115 of the Rules provide that "an application for review and any supplement thereto shall be filed within 30 days from the date of public notice of such action, as that action is defined in Section 1.4(b) of these rules." the Petition for Administrative Review seeks review of the June 29, 1995, Letter Decision, public notice of which was released July 7, 1995, Report No. 43544. Thus, pursuant to Section 1.115(d), the application for review and any supplement was due August 7, 1995. While the original version of the Petition for Administrative Review was filed by the August 7 due date, the "Revised" version, which made several changes in the text, was filed three days late, with no motion for acceptance or other explanation of the nature or need for the revisions. The "Revised" version was thus unauthorized and will not be accepted or considered by the Commission. With respect to Jones's November 3, 1995, filing of "Additional Evidence," Section 1.115(d) permits the filing of only an application for review, an opposition, and a reply. Jones's "Additional Evidence," which was submitted without any motion or other request seeking to justify its acceptance, is a further pleading not authorized under Section 1.115(d). In addition, Section 1.115(c) of the Rules provide that "[n]o application for review will be granted if it relies on questions of law or fact which the designated authority has been afforded no opportunity to pass." Further, Jones's "Additional Evidence" filing does not provide any decisionally significant facts which are required to be considered in our determination of the public interest. For these reasons, Jones's "Additional Evidence" will be dismissed as an unauthorized pleading.

Jones on August 7, 1995, which seeks reconsideration of the remaining aspects of the same Letter Decision which denied Jones's Petition to Deny the subsequent assignment of KOLA(FM) from Stanfield to Inland.[3] Also under consideration is an

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[3] Also before the Commission with respect to the Petition for Reconsideration are a "Petition for Reconsideration ("Revised") filed by Jones on August 10, 1995; an "Opposition to Petition for Reconsideration" filed by Stanfield on August 22, 1995; an "Opposition of Inland Empire Broadcasting corporation to 'Petition for Reconsideration'" filed by Inland on August 22, 1995; a "Reply to Petition for Reconsideration" filed by Jones on September 26, 1995; and a pleading entitled "Additional Evidence" filed by Jones on November 3, 1995. As with his similar pleading filed with respect to his Petition for Administrative Review (see note 2, supra), Jones's August 10, 1995, "Petition for Reconsideration ("Revised")" and November 3, 1995, "Additional Evidence" pleadings are hereby dismissed without consideration for the following reasons. With respect first to the "Petition for Reconsideration (Revised)," Section 1.106(f) of the Rules provides that "[t]he petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action, as that action is defined in Section 1.4(b) of these rules.... No supplemental or addition to a petition for reconsideration which has not been acted upon by the Commission or by the designated authority, filed after expiration of the 30 day period, will be considered except upon leave granted upon a separate pleading for leave to file, which shall state the grounds therefor." The Petition for Reconsideration seeks reconsideration of that aspect of the June 29, 1995, Letter Decision which granted the assignment of KOLA from Stanfield to Inland, public notice of which was released July 7, 1995, Report No. 43544. Thus, pursuant to Section 1.106(f), the petition for reconsideration and any supplement were due August 7, 1995. While the original version of the Petition for Reconsideration was filed by the August 7 due date, the "Revised" version, which made several changes in the text, was filed three days late, with no motion or other explanation of the nature or need for the revision. The "Revised" version

Application for Review filed by Inland with respect to the Letter of the Acting Chief, Audio Services Division, to Joseph D. Jones, dated December 13, 1995 (hereafter "December 13 Letter"), which granted Jones's December 4, 1995, petition for Reconsideration of the dismissal of the Petition for Administrative Review and the Petition for Reconsideration and reinstated those Petitions.[4] Because many of the issues raised by

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was thus unauthorized and will not be accepted or considered by the Commission. With respect to Jones's November 3, 1995, filing of "Additional Evidence," Section 1.106(f), (g), and (H) permit the filing of only a petition for reconsideration, an opposition, and a reply. Jones's "Additional Evidence," which was submitted without any motion or other request seeking to justify its acceptance is a further pleading not authorized under Section 1.106. Further, Jones's "Additional Evidence" filing does not provide any decisionally significant facts which are required to be considered in our determination of the public interest. For these reasons, Jones's "Additional Evidence" will be dismissed as an unauthorized pleading.

[4] Jones's December 4, 1995, Petition for Reconsideration sought reconsideration of a Letter of the Acting Chief, Audio Services Division dated October 27, 1995 (hereafter "October 27 Letter"), dismissing Jones's August 7, 1995, Petition for Administrative Review and Petition for Reconsideration on the grounds that these Petitions were not timely filed under the Commission Rules. Reconsideration was granted and the Petitions were reinstated by the December 13 Letter after review of evidence that these petitions were timely filed. Also under consideration with respect to Inland's Application for Review is an Opposition to Application for Review filed by Jones on January 31, 1996, and a Reply to Opposition to Application for Review filed by Inland on February 14, 1996.

Jones in his Petitions are related and duplicative, the Mass Media Bureau has referred the Petition for Reconsideration to the Commission, as permitted pursuant to Section 1.106(a)(1) of the Rules, for resolution in conjunction with our consideration of the application for review. We accept the referral of the Petition for Reconsideration so that all the issues relating to Station KOLA(FM) can be resolved as expeditiously as possible.

BACKGROUND

2. KOLAI's sole stockholder is Frederick Cote ("Cote"). In early 1992, Cote was indicted on five felony charges in the State of California. While he was awaiting trial, KOLAI and SBR Broadcasting Corporation ("SBR") negotiated for SBR to purchase KOLA (FM), resulting in a sales agreement executed on June 5, 1992. The parties also entered into a loan agreement at the same time whereby Anaheim Broadcasting Corporation ("Anaheim"), SBR's parent corporation, loaned KOLAI $500,00, taking back a promissory note secured by KOLAI's assets. On September 21, 1992, an application was filed with the Commission for consent to the assignment of KOLA(FM) to SBR (File No. BALH0920921HJ). Jones filed a Petition to Deny the assignment application.

3. On January 1, 1994, SBR assigned its contract rights to another subsidiary of Anaheim, Inland. KOLAI defaulted on its obligation under the promissory note, and Anaheim filed a complaint for collection in California Superior Court on April 20, 1994, seeking foreclosure on the assets of KOLAI and appointment of a receiver, as provided for in the security agreement. The California Superior Court, County of San Francisco, appointed Ray Stanfield receiver on April 21, 1994. An application for the pro forma assignment of the KOLA and KMET[5] license from KOLAI to Stanfield as receiver was filed on May 13, 1994,

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[5] As noted above, KOLAI was also the licensee of Station KMET(AM), Banning, California. The May 13, 1994, pro forma assignment application also sought authority for the assignment of KMET from KOLAI to Stanfield; however, Jones did not seek reconsideration of the assignment of KMET to Stanfield. An application was subsequently filed on July 5, 1995, to assign KMET from Stanfield to Robeson/Suttles Broadcasting, Inc. On August 17, 1995, Jones filed a Petition to Deny the KMET assignment, and that Petition to Deny was dismissed, and the KMET assignment application granted, by the Audio Services Division letter decision dated November 8, 1995. Jones subsequently filed a Petition for Reconsideration of the KMET assignment grant, and reconsideration was denied by staff action dated March 26, 1996. An Application for Review of the denial of reconsideration of the KMET grant was filed by Jones on April 29, 1996, and is pending before the Commission.

and was granted by the Commission's staff on June 21, 1994. On July 6, 1994, an application to assign KOLA from Stanfield to Inland was filed[6] Subsequently, on July 11, 1994, Cote was convicted of four felonies, including murder. On July 25, 1994, Jones filed a Petition for Reconsideration of the granted assignment of KOLA from KOLAI to Stanfield, and on August 15, 1994, Jones filed a Petition to Deny the application for assignment of KOLA from Stanfield to Inland.

4. The Letter Decision denied both Jones's request for reconsideration of the grant of the application to assign the KOLA license to Stanfield and Jones's Petition to Deny the assignment of KOLA from Stanfield to Inland. With respect to the assignment to Stanfield as Receiver, the staff found that Anaheim had obtained the appointment of a receiver from the California state court in order to protect the assets of KOLAI in which Anaheim held security interest, and that the Commission had neither the expertise nor jurisdiction to challenge the court's finding that the appointment of a

[6] At the request of SBR, the application to assign KOLA from KOLAI to SBR was dismissed July 27, 1994.

receiver was appropriate in this case. In addition, the staff held that Jones had failed to prove his allegation that the receivership proceeding was an attempt by Anaheim to perfect a security interest in KOLA's license, or that the receivership action was part of a collusive scheme to assure that Cote's conviction would not bar acquisition of KOLA by Anaheim's subsidiary.

5. With respect to the assignment of KOLA to Inland, the staff found that, notwithstanding Jones's contrary allegations, there was no evidence that Anaheim prematurely took control of KOLA. In addition, the staff held that the assignment to Inland, notwithstanding Cote's conviction for murder, could be granted because the parties had demostrated, consistent with the Commission's Second Thursday policy,[7] that Cote would not have any part in the proposed operation of KOLA and that Cote would not benefit from the sale proceeds. However, to insure that Cote would not receive any benefit, Stanfield was required, as a condition to the grant, to provide a full

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[7] See paragraph 16, infra.

accounting of the proceeds of the sale within 90 days after consummation.

6. Finally, in response to numerous other allegations raised by Jones against approval of the assignment of KOLA to Inland, the staff found that: (1) Jones had failed to establish that the parties to the proceeding had not provided required documents or other information to the Commission; (2) Jones's allegation of "fraudulent" EEO reports being filed by Inland for another station it owns were adequately rebutted; (3) documents allegedly missing from the public file were made available to Jones subsequently and that, in any event, a public file violation of this nature was not sufficient to bar an assignment; and (4) allegations of the broadcast of indecent material were insufficiently supported by Jones. Accordingly, the staff denied Jones's Petition to Deny and granted the assignment of KOLA from Stanfield to Inland.

7. Jones's Petition for Administrative Review. Jones

raises two issues in his Petition for Administrative Review with respect to the assignment of KOLA to Stanfield as Receiver.[8] Jones first contends that KOLAI, Cote, and Anaheim/SBR/Inland "worked on a collusive basis to have

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[8] Jones also raises a third argument that Cote attempted to flee prosecution on June 1, 1991, by traveling under an assumed identity to Hawaii, where he was arrested on September 17, 1991, and that during that time, he had "abandoned the license of KOLA-FM," so that Cote had no license to assign to Stanfield. This issue was not mentioned in Jones's July 25, 1994, Petition for Reconsideration nor in any reply or other responsive pleadings, nor was it passed on by the staff in the June 29 Letter Decision." Jones had raised this "abandonment" contention in an earlier proceeding in connection with his October 23, 1992, Petition to Deny the application for assignment of the KOLA license from KOLA, Inc., to SBR Broadcasting Corp., file No. BALH-920921HJ. As noted above at note 5, supra, that application was dismissed by the Commission on July 27, 1994. Although Jones had the opportunity to raise this issue again in his July 25, 1994, Petition for Reconsideration, he did not do so, and his attempt to do so at the application for review stage in this proceeding is untimely. See 47 C.F.R. Section 1.115(c). Nor do Jones's allegations raise an issue of substantial public interest improtance warranting our consideration of the issue notwithstanding these serious procedural infirmities. Thus, we will not consider the argument further.

a receiver appointed to avoid designation of the assignment application for hearing." Second, Jones contends that there was a premature assumption of control by Stanfield at the time of his appointment as receiver, prior to the grant of assignment application two months later.

8. Jones's Petition for Reconsideration. Jones raises four issues in his Petition for Reconsideration of the assignment of KOLA to Inland.[9] First, Jones claims the staff lacked the delegated authority to resolve the issue he alleged in his Petition to Deny that SBR submitted "fraudulent EEO reports for its Station KCAL-FM, Redlands, California. Second, Jones asserts that the assignment to Inland would vio-

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[9] Jones also raises the "abandonment of license: argument in the Petition for Reconsideration. Again, while Jones raised this allegation in a previous proceeding regarding the 1992 application to assign KOLA from KOLA1 to SBR, this allegation was not raised in Jones's August 15, 1994, Petition to Deny the assignment to KOLA to Inland. This argument is untimely raised at this point in the proceeding and will not be considered. See 47 C.F.R. Section 1.106(c) and note 8, supra.

late the Second Thursday policy. Third, Jones alleges that KOLAI engaged in an unauthorized transfer of control of KOLA to SBR through the implementation of a local marketing agreement with SBR while Cote was in prison awaiting trial. Finally, Jones repeats his allegation that KOLAI, Cote, and Anaheim/SBR/Inland "colluded" to obtain the appointment of the receiver for KOLAI, in order to "perfect" the Anaheim security interest in the KOLA license.

9. Inland's Application for Review. Inland filed an Application for Review of the staff's December 13 Letter to the extent that it granted Jones's December 4, 1995, Petition for Reconsideration of the staff's October 27 Letter dismissing Jones's August 7, 1995, Petition for Reconsideration of the grant of the application to assign KOLA to Inland. The October 27 Letter had dismissed both the Petition for Reconsideration and the Petition for Administrative Review because the Bureau could not determine that either pleading had actually been filed by the August 7, 1995, deadline, rather than August 10, 1995, which was when copies

of those pleadings labeled by Jones as "Revised" were received by the Commission./[10] Inland contends first that Jones did not provide adequate proof that the Petition for Reconsideration and Petition for Administrative Review were timely filed, since he supplied only a Federal Express receipt and not date-stamped copies of the pleadings. Second, Inland contends that Jones's December 4 Petition for Reconsideration was itself not timely filed, because the Commission's November 2, 1995, descriptive Public Notice of the October 27 Letter did not contain an adequate description of the action taken with respect to the Petition for Reconsideration of the grant to Inland.

DISCUSSION

Jones's Petition for Administrative Review

10. Jones's Petition for Administrative Review suffers from numerous fundamental procedural failures, and we will dismiss it for this reason. First, on our own mot-

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[10]/ See notes 2-4, supra.

ion, we find that the staff erred in finding that Jones had standing to file his initial August 4, 1994, Petfor Reconsideration of the grant of the assignment to Stanfield, in light of Jones's failure to file an objection to that assignment before it was granted. Section 1.106(b)(1) of the Rules, 47 C.F.R. Section 1.106(b)(1), requires that "[i]f the petition [for reconsideration] is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interest are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding." (Emphasis added). The Form 316 assignment application was filed May 13, 1994, and public notice of the filing was given on May 26, 1994. See Public notice, Report No. 15814, released May 26, 1994. Jones's July 25, 1994, Petition for Reconsideration did not attempt a showing as to why he could not have filed a timely objection to this assignment. For this reason, Jones's July 25, 1994, Petition for Reconsideration of the grant to Stanfield should have been dismissed without consideration. In addition, the Petition for

Administrative Review is itself procedurally deficient because it fails to comply with the Commission's requirement that such requests for Commission review set out both the specific questions presented for review and the nature of the alleged errors made by the delegated authority. See 47 C.F.R. Sections 1.115 (b)(1),(2). For these reasons as well, the Petition for Administrative Review will be dismissed. Notwithstanding the formal dismissal of Jones's Petition for Administrative Review, we will address the merits of the issues raised in Jones's Petition for Administrative Review, to the extent that such issues were properly raised before the Bureau as required by Section 1.115(c) of the rules (see note 8, supra).

11. Collusion in the Appointment of the Receiver. Jones argues in the Petition for Administrative Review that various parties colluded to have Stanfield appointed as receiver of the assets of KOLA, Inc. We agree with the staff's resolution of this issue as set forth in the Letter Decision. Stanfield was appointed Receiver of the assets of KOLAI at the request of Anaheim by the Superior Court of the State of

California. In addition, the Superior Court for the State of California, County of San Francisco, has denied Jones's separate attempts to challenge the appointment of Stanfield as Receiver./[11] The Commission does not have the expertise or jurisdiction to challenge a state court's finding that the appointment of a receiver was appropriate in a particular case, and Jones has presented nothing to warrant departure from the Commission's policy of deferral to the state courts in determining the legitimacy of a receivership appointment. See H. Edward Dillion, 42 FCC 2d 203, 205 (1973). If Jones believe that Cote and KOLAI are "alter egos" and that applicable state laws have been violated in the receivership proceeding, Jones must pursue those allegations in state court rather than at the Commission. See Arecibo Radio Corp., 101 FCC 2d 545, 550 n. 12 (1985) (Commission policy "is to accommodate state and local court decrees adjudicating disputes

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[11]/ Copies of the Court's orders denying Jones's challenges to the appointment of the Receiver were attached as Exhibit A to Stanfield's December 9, 1994, Motion for Expedited Action, and Exhibit A to Stanfield's February 2, 1995, Supplement to Reply to Opposition for Expedited Action.

over contract and property rights, unless a public interest determination...compels a different result."). Thus, Jones's request that we intervene on this issue will be denied.

12. Premature Assumption of Control. Jones[] also argues that Stanfield prematurely assumed control of Station KOLA immediately upon his appointment as Receiver on April 21, 1994, rather than waiting until the application for assignment to Stanfield was granted on June 21, 1994. This contention was based on the language of the Superior Court's Order appointing Stanfield which directed him to "...take possession of...[a]ll assets...owned by KOLA, Inc., including...all licenses...issued to KOLA, Inc. by the Federal Communications Commission..." While Jones contends that this language provides "irrefutable" proof of the alleged premature takeover by Stanfield, in fact, Stanfield completely refuted that claim./[12] Stanfield, in response

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[12]/ We note that Stanfield has argued, in his Opposition to Petition for Administrative Review, that this issue was not timely raised by Jones and was thus improperly considered by the staff. Specifically, Stanfield argues that this issue was first raised b Jones in his January 28, 1995, Petition for Expedited Action, filed well after the deadline for fil-

to this allegation, noted that several individuals who were in fact involved in the operation of KOLA during this period had previously filed declaration asserting that the only action Stanfield took prior to the Commission's grant of the assignment to Stanfield was conducting an inventory of KOLAI's assets, as required by the local court./[13] In addition, Stanfield supplied a copy of a letter he sent to KOLAI's General Manager dated April 26, 1994,/[14] stating that although the Court's April 21 order suggested that he was to take "possession" of the KOLAI licenses immediately, he was aware that he could not do so until after Commission approval, and he specifically disavowed any intention to take control of the stations' pro-

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ing petitions for reconsideration of that grant. While a strict reading of Section 1.106(f) of the Rules, 47 C.F.R. Section 1.106(f), supports Stanfield's position, we will nonetheless address the issue because the staff had an opportunity pass on it (and did so) in the Letter Decision. See 47 C.F.R. Section 1.115(c).

[13]/ These declaration, from Frederick Cote, John Lego (the General Manager of KOLA at that time), and Gary Schwartz (KOLAI's counsel), were filed in the companion proceeding for assignment of KOLA from Stanfield to Inland, as attachments to Inland's Opposition to Petition to Deny filed September 20, 1994.

[14]/ See Exhibit A to Stanfield's February 16, 1995, Reply to Petition for Expedited Action.

gramming, personnel, or technical operations until after such a Commission grant. Other than the language of the court's receivership order, which alone does not establish that Stanfield prematurely assumed control of KOLA, Jones presented no evidence which would establish that Stanfield assumed control of the station prior to the Commission's grant of the assignment application. We concluded that Jones failed to present a substantial question of material fact whether Stanfield prematurely assumed control of Station KOLA prior to Commission authorization.

Jones's Petition for Reconsideration

13. False Employment Reports. The first argument raised in the Petition for Reconsideration of the grant of the assignment from Stanfield to Inland is that SBR, which like Inland is a wholly-owned subsidiary of Anaheim, filed inaccurate annual employment reports in 1991, 1992, and 1993 for SBR's Station KCAL-FM, Redlands, California. According to Jones, the letter Decision rejected a "documented allegation" that SBR filed "fraudulent EEO reports" and the Mass

Media Bureau does not possess delegated authority to issue rulings in such cases. This contention is based on Section 0.2839b0 of the Commission's Rules, 47 C.F.R. Section 0.283(b), which states that the Bureau must refer petitions and other objections to the Commission if they present "documented allegations of failure to comply with the Commission's equal employment opportunity rules and policies."

14. We find that it was within the Mass Media Bureau's delegated authority to rule on Jones's allegations that SBR filed "fraudulent" EEO reports. The crux of this allegation is Jones's contention that Dawn Ortiz, who had been identified in KCAL-FM's annual employment reports as an Hispanic, may actually have been a woman formerly named Dawn Lewis, a Caucasian. This theory was premised on documents showing that a woman formerly named Dawn Lewis married a man named Ricardo Ortiz in 1981. Jones offered no affidavit or other proof that Dawn Lewis and Dawn Ortiz are the same person, but only speculated that "[i]f Mrs. Ortiz is the former Dawn Michelle Lewis, the last 3 annual reports (1991-1993) submitted to the Commission by 'SBR' contain fraudulent information." (Em-

phasis added). Such speculation cannot be considered a "documented allegation of failure to comply with the Commission's Equal Employment Opportunity rules and policies" and does not require referral to the Commission under the Bureau's delegated authority rule, Section 0.283(b). Jones did not submit any affidavit or declaration under penalty of perjury from any person having person knowledge of the facts alleged, i.e., that Dawn Ortiz was in fact Dawn Lewis and not an Hispanic. See 47 U.S.C. Section 309(d). Inland, in response, submitted a sworn declaration of SBR's Chief Financial Officer in which he stated unequivocally that Dawn Ortiz is not the former Dawn Michelle Lewis. For essentially this same reason, the Bureau properly rejected on the merits Jones's allegation that SBR filed false annual employment reports.

15. Pursuant to the decision in Astroline Communications Co. Limited Partnership v. FCC, 857 F.2d 1556 (D.C. Cir. 1988), if the Commission determines that the petitioner's allegations, if true, provide a prima facie basis to preclude a public interest finding that the contested applica-

tion should be granted, we must then determine whether a substantial and material question of fact has been raised" 'on the basis of the application, the pleadings filed, or other matters which it may officially notice....'" id. at 1561. In the present case, Jones's allegations, unsupported by any affidavit of a person having personal knowledge that Dawn Ortiz was previously known as Dawn Lewis or is not Hispanic, cannot be considered sufficient to establish a prima facie showing under the first leg of the Astroline test. See 47 U.S.C. Section 309(d). See also Beaumont Branch of the NAACP v. FCC, 854 F.2d 501 (D.C. Cir. 1988) (explaining that a petition to deny "must show the necessary specificity and support; mere conclusory allegations are not sufficient."); Texas RSA 1 limited Partnership, 7 FCC Rcd 6584, 6585 (1992) (finding that a petition to deny failed to establish a prima facie case where the petitioner's pleadings were "replete with conclusory allegations unsupported by specific facts)"; KRPL, Inc., 5 FCC Rcd 2823 (1990) (finding that a newspaper article which quoted a broadcast applicant's controlling principal as stating that he "may need local

investors" did not present facts sufficient to establish a prima facie case that the applicant was not financially qualified or lacked candor in certifying to its financial qualification at the time of filing). Moreover, Jones's speculative allegations were completely answered and contradicted by the sworn declaration of SBR's Chief Financial Officer, Douglas Iida, who stated that based on his personal knowledge, Dawn Ortiz was not formerly Dawn Lewis, and is indeed Hispanic. Thus even if Jones's allegation has been sufficient to establish a prima facie showing (and they are not), there would remain no substantial and material question of fact as to whether SBR had falsely reported Ms. Ortiz as an Hispanic. See Mobile Comunications Corp. of America v. FCC, 77 F.3d 1399, 1410 (D.C. Cir. 1996) (holding that negative resolution of question as to whether substantial and material question of fact is presented renders moot the question of whether a prima facie case has been raised by a petition to deny).

16. Second Thursday Policy. Jones next seeks reconside-

ration of the holding set forth in the Letter Decision that the grant of the assignment application is consistent with the Commission's policy established in Second Thursday Corp., 22 FCC 2d 515, 516, recon. granted, 25 FCC 2d 112 (1970). As a matter of general policy, the Commission will not approve an assignment or transfer application where a licensee's qualification to continue holding the license are at issue. Jefferson Radio v. FCC, 340 F.2d 781 (D.C.Cir. 1964). If, after hearing, a licensee is found not qualified, there will be no license to assign. However, in Second Thursday, the Commission established an exception to this general policy. In that case, a licensee in hearing on qualifcation issues was forced into bankruptcy, and the bankruptcy trustee sought to assign the license to a new party. The Commission determined that the license could be assigned where the individuals charged with the misconduct: (1) would have no part in the proposed operations, and (2) would derive no benefit from the grant of the application or would receive only a minor benefit which would be outweighed by equitable considerations in favor of innocent creditors. 22

FCC 2d at 516.

17. The Second Thursday policy has been applied many times, including in cases involving receivership and foreclosure actions initiated under state law. See, e.g., J. C. Bell, 10 FCC Rcd 4916 (1995)); New South Broadcasting, Inc., 8 FCC Rcd 1272 (1993); Davis Broadcasting Co., 67 FCC 2d 872 (1977); Hertz Broadcasting of Birmingham, Inc. 57 FCC 2d 183 (1976). Although KOLAI owner Frederick Cote was convicted of murder, the Bureau was correct in approving the assignment to Inland in this case because the parties made a sufficient showing to warrant application of the Second Thursday policy. Jones contends as a preliminary matter that it was improper to apply the Second Thursday policy to this case because KOLAI was not in bankruptcy but rather in a foreclosure proceeding in which a receiver was appointed./[15] However, the Commission has applied the Second Thursday policy in both bankruptcy and receivership cases, as long as the appropriate showing is made that the two-prong test for application of

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[15]/ Jones thus faults the staff's reliance on J. C. Bell, supra, 10 FCC Red 4916, because in that case the former licensee was in Chapter 7 bankruptcy liquidation.

the policy has been met. See, e.g., Davis Broadcasting Co., Inc., supra, 67 FCC 2d 872, 874; see also Radio Management Services, Receiver, 7 FCC Rcd 2959, 2960 note 9, 2961 (1992). Unlike a bankruptcy, in a receivership, there may not be court supervision of the disposition of assets. Therefore, the Commission may need additional assurance that the wrongdoers will not receive a benefit inconsistent with the Second Thursday policy. It is for this reason that the staff properly conditioned the present assignment on the post-closing submission by the Receiver of a statement verifying that in the final disposition of KOLAI's assets, Cote did not in fact receive any benefit. With this added protection, the staff properly assured that application of the Second Thursday policy to this receivership situation was consistent with the policy.

18. With respect to the specific application of the first prong of the Second Thursday criteria in this case, it is uncontested that Cote will play no role in the operation of KOLA after the assignment to Inland. Jones does contend, however, that the Bureau erred, under

the second prong, in finding that Cote would not receive any benefit from the $5 million purchase price for the station. Jones asserts that Cote received the benefit of a $400,000 loan which KOLAI provied to Cote in 1992 from the proceeds of a $500,000 loan that Anaheim made to KOLAI at that time. In addition, Jones contents that a $2.5 million payment to Cote's former wife under a court order pursuant to their divorce, to be paid from the proceeds of the sale, was a benefit to Cote because that payment represents a personal debt obligation of Mr. Cote to his ex-wife, from which he will thus be relieved. Further, according to Jones, the former Mrs. Cote may not be an "innocent creditor" because it was possible that she had divorced him in order to obtain that payment.

19. The staff correctly found that the instant assignment would not result in a direct or indirect benefit to the wrongdoer, Frederick Cote. Inland and Stanfield provided sworn declarations that the current and contingent liabilities of the Receiver exceeded $2.5 million, and that Jane Cote, Frederick Cote's former

wife, was entitled to half the purchase price, $2.5 million, under California's community property law. Frederick Cote would therefore not receive any of the $5 million purchase price./[16] In addition, the $400,000 loan that Cote received from KOLAI in 1992 was not part of the proceeds from the purchase price of KOLA and thus cannot be considered to be a benefit to Cote resulting from this sale. Anaheim had loaned KOLAI $500,000 in 1992, and KOLAI in turn loaned $400,000 of that amount to Cote, which he used to pay for his criminal defense attorneys. However, the initial loan from Anaheim to KOLAI was not a "down payment," but rather a secured twelve month loan that was separate and apart from the purchase price, and was required to be repaid to Anaheim whether the sale to SBR or Inland or some

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[16]/ As a condition to the grant of the assignment to Inland, Stanfield was required, pursuant to the Second Thursday policy, to provide the Commission within 90 days of the closing a sworn statement demonstrating that Cote has received no benefit or value from the KOLA transaction, including an accounting of the disposition of the assets of KOLAI, and including the proceeds of the sale to Inland. the assignment was consummated on July 15, 1995, and Stanfield filed the required accounting on October 12, 1995. the staff's review of this filing confirms that Cote did not receive any proceeds of the sale.

third party was consummated or not. In addition, as established by sworn declaration from an officer and counsel for KOLAI, Gary N. Schwartz,/[17] the subsequent loan from KOLAI to Cote will not be forgiven upon the sale of the station and will remain a personal liability of Mr. Cote's to KOLAI. Mr. Schwartz further attested that after the sale of the station KOLAI will continue to be a corporate entity that is half owned by Mr. Cote's former wife, and she thus has an interest in the repayment of this loan. We conclude that Cote's receipt of the loan from KOLAI 1992 out of funds lent to KOLAI by Anaheim was not a benefit to him from the assignment of the station to Inland.

20. We also reject Jones's contentions that the payment of half the purchase price to the former Mrs. Cote is a benefit to Mr. Cote by satisfying his personal debt to her, or that Mrs. Cote might not be an innocent creditor. First, the payment of half the sale proceeds to Jane Cote did not represent a satisfaction of Mr.

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[17]/ Mr. Schwartz's Declaration was submitted as Exhibit D to Inland's September 20, 1994, Opposition to the Petition to Deny.

Cote's personal obligation to his ex-wife. Rather, Mrs. Cote held 50% equity ownership in KOLAI under California's community property law,/[18] and she was essentially in the shoes of an innocent shareholder or partner. Therefore, the payment of sale proceeds to Mrs. Cote was in satisfaction of her joint ownership right rather than a discharge of any debt from Mr. Cote to Mrs. Cote./[19] The Second Thursday policy does not bar such innocent owners from receiv-

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[18]/ California Family Law Code, Section 700 et seq. and Section 2500 et seq. the "Stipulation and Order Thereon re: Sale of Business and Distribution of Funds" issued June 4, 1992, by the Superior Court for the County of Riverside in the Cote divorce proceeding (a copy of which was appended to Jones's Petition to Deny as Exhibit 12) states at paragraph 2 that Frederick Cote's interest in KOLAI is community property, the proceeds of which were to be divided between Mr. and Mrs. Cote upon the sale of the station. This division of property order thus reflects Mrs. Cote's 50% equity ownership of KOLAI rather than a personal obligation of Mr. Cote to Mrs. Cote. Further, if there is no sale of the station, Mrs. Cote receives no sale proceeds.

[19]/ In this respect, this case differs substantially from those cited by Jones in his Petition for Reconsideration. Capital City Communications, Inc., 33 FCC 2d 703 (1972), and Mid-State Broadcasting Co., 61 FCC 2d 196 (1976). In those cases there was evidence that the wrongdoers would receive substantial indirect benefits through the satisfaction of their large personal obligations on loans to creditors who were to be satisfied from the proceeds of the sale.

ing excess proceeds of the sale after creditors are satisfied. See KOZN FM Stereo 99 LTD., 5 FCC Rcd 2849, 2850 (1990). With respect to the further allegation that Mrs. Cote may have contrived her "separation, divorce and subsequent marriage" in order to defeat Commission policy," or that she otherwise was not an "innocent creditor," Jones has presented no evidence to support his speculation as to Mrs. Cote's collusion or other alleged lack of innocence.

21. Unauthorized Transfer of Control to SBR. Jones's next contention is that KOLAI engaged in an unauthorized transfer of control of Station KOLA(FM) upon entering into a Local Marketing Agreement with SBR on June 5, 1992. Under that LMA, SBR began providing programming to KOLA. In his Petition for Reconsideration, Jones very briefly alludes to his argument the LAM, in combination with a security purchase agreement between KOLAI and SBR entered the same date, gave SBR de facto control over the operations of KOLA. The only substantive "evidence" in support of this allegation contained in Jones's present Petition for Reconsideration is a quotation from

a February 1992 declaration of Frederick Cote, in which he apparently stated that he did not then have control over his assets due to his incarceration. However, as pointed out by Inland in its August 22, 1995, Opposition to the Petition for Reconsideration, Cote's quoted declaration was executed several months before SBR entered into the LMA and loan agreement with KOLAI. Jones's Petition for Reconsideration provides no new facts or argument on this issue. We affirm the holding of the Letter Decision at pages 6-7 that Jones has not provided evidence sufficient to rebut the sworn declaration submitted by Inland and Stanfield that KOLAI had retained control over the station's, finances, personnel, and programming during the period that the LMA was in effect. The terms of the LMA provided that ultimate station control would remain with KOLAI, and the record does not indicate any conduct by the parties that is inconsistent with these terms. Nothing in Jones's Petition for Reconsideration warrants modification of the staff's conclusions on this issue.

22. Collusion in the Appointment of the Receiver.

The final issue raised by Jones in his Petition for Reconsideration of the grant of the assignment to Inland is that various parties colluded to have Mr. Stanfield appointed receiver of the assets of KOLAI, in order to avoid having a character issue designated against the KOLAI licenses. This same issue was raised by Jones in his Petition for Administrative Review of the grant of the assignment to Stanfield. As discussed above at paragraph 11, supra, Stanfield was appointed Receiver by order of the Superior Court of the State of California, San Francisco County, and Jones's efforts to challenge that appointment in Superior Court have been rejected by that Court. For the reasons set forth in paragraph 11, generally we will not second-guess the local court of competent jurisdiction regarding the legitimacy of a receivership appointment. In this case, Jones[] has not justified departure from this long-standing policy of deference to local courts on these matters. We affirm the staff's conclusion on this issue as set forth in the Letter Decision.

Inland's Application for Review

23. Inland filed an Application for Review of the staff's December 13 Letter to the extent that it granted reconsideration of the October 27 Letter's dismissal of Jones's August 7, 1995, Petition for Reconsideration of the grant of the assignment to Inland. The staff's October 27 Letter had dismissed both the Petition for Reconsideration and the Petition for Administrative Review because the Bureau could not determine that either pleading had actually been filed by the August 7, 1995, deadline, rather than August 10, 1995, which was when copies of those pleadings labeled by Jones as "Revised" were received by the Commission. Inland raises two points of alleged error by the staff. First, Inland claims that Jones, in his December 4, 1995, Petition for Reconsideration of the dismissal of his August 7 pleading, did not provied adequate proof of the timely filing of those pleadings by the August 7 deadline, because he supplied only a Federal Express document showing receipt by the Commission on August 7, rather than date-stamped copies of the pleadings. We need not reach the question of the adequacy of Jones's proof of timely filing of the two documents because the staff has subsequently located previously

misfiled copies of the original versions of the August 7 Petition for Reconsideration and Petition for Administrative [R]eview, both bearing the Commission's mail room stamp of August 7, 1995.

24. Inland's second contention is that Jones's December 4, 1995, Petition for Reconsideration of the dismissal of his August 7 Petition for Reconsideration was late-filed, because a November 2, 1995, Public Notice of the October 27 Letter only included a description of the dismissal of Jones's Petition for Administrative Review of the grant to Stanfield and did not include a description of the further action in the October 27 Letter dismissing the Petition for Reconsideration of the assignment to Inland. According to Inland, because there was no descriptive Public Notice of the dismissal of the Petition for Reconsideration, Section 1.4 (b)(5) of the rules require that public notice of that action was deemed to have been provided on the date of the October 27 Letter itself, thus requiring that a Petition for reconsideration of the grant of the Inland assignment was due by November 27,1995. We do not agree with Inland's narrow reading

of the relevant provisions of Section 1.4(b) of the Rules. Section 1.4(b)(4) establishes that "[i]f the full text of an action document is not to be released by the Commission, but a descriptive document entitled 'Public Notice' describing the action is released, the date on which the descriptive 'Public Notice' is released" shall constitute the date of public notice. In this case, there was a single "action document," the October 27 Letter, which contained pronouncements regarding more than one "action." However, "action documents" commonly contain several discrete "actions" by the Commission, including rulings on various ancillary motions and petitions, and the release of a descriptive "Public Notice" describing the primary action does not create a separate filing for a party seeking reconsideration or review of another action contained in the same order. In this case, the omission of a description of the second action taken in the October 27 Letter cannot reasonably be construed to result in a separate, earlier filing deadline for the action not specifically described.

Most fundamentally, Inland misconstrues the role of the public

notice process in preserving a party's right of review of agency actions. A public notice which initiates the thirty-day period for seeking review or reconsideration is "adequate only if it alerted interested parties to documents which would allow them to determine whether their interests were implicated." Hispanic Information and Telecommunications Network v. FCC, 865 F.2d 1289, 1295 (D.C. Cir. 1989). Moreover, the Court has recognized that the Commission has wide latitude regarding the information included in a public notice, provided that the notices give "fair warning" of the scope of the described action. See Ridge Radio Corporation v. FCC, 292 F.2d 770, 773 (D.C. Cir. 1961). The public notice of the October 27 Letter was sufficient to permit someone exercising reasonable diligence to identify and locate this document. See Thomas W. Tittle, 5 FCC Rcd 1196, 1197 (1990) (interested parties must exercise reasonable diligence in reviewing public notices). Accordingly, this descriptive document constituted "public notice" of all actions contained in the October 27 Letter, for these reasons, we conclude that Jones's December 4, 1995, Petition for

Reconsideration of the dismissal of his August 7 Petition for Reconsideration was timely filed, and Inland's Application for Review will be denied.

26. Accordingly, IT IS ORDERED that the Petition for Administrative Review filed on August 7, 1995, by Joseph D. Jones, with respect to the grant of the assignment of license of Station KOLA(FM) from KOLA, Inc., to Ray M. Stanfield, Receiver (File No. BALH 940513EC), IS DISMISSED; that the Petition for Reconsideration filed by Joseph D. Jones on August 7, 1995, with respect to the grant of the assignment of the license of Station KOLA(FM) from Ray M. Stanfield, Receiver, to Inland Empire Broadcasting Corporation (File No. BALH 940706(GP), IS DENIED; that the Application for Review filed by Inland Empire Broadcasting Corporation on January 16, 1996, with respect to the Letter of the Chief, Audio Services Division, to Joseph D. Jones, dated December 13, 1995, Reference 1800B2-RHW, IS DENIED; that the grant of the application for assignment of the license of Station KOLA(FM), San Bernardino, California, from KOLA, Inc., to Ray M. Stanfield, Receiver (File No. BALH-940513EC),

IS AFFIRMED; and that the grant of the application for assignment of the license of Station KOLA(FM), San Bernardino, California, from Ray M. Stanfield, Receiver, to Inland Empire Broadcasting Corporation (File No. BALH-940706GP) IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX E

No. 95-1572 September Term, 1995

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

Joseph D. Jones
Petitioner

v.

Federal Communications Commission
Respondent

Frederick Cote, et al.,
Intervenors

Filed: Aug. 28, 1996

BEFORE: Henderson, Rogers, and Tatel, Circuit Judges

ORDER

Upon consideration of the Motion to dismiss, the opposition thereto, and the reply; the motion to hold in abeyance; and petitioner's motion to stay, it is

ORDERED that the motion to dismiss be granted. An application to the Federal Communications Commission for review of a decision rendered by the Commission's Mass Media Bureau is a "condition prece-

dent to judicial review." See 47 U.S.C. Section 155(c)(7). Because petitioner has not obtained a final order from the Commission disposing of any such application, this court is without authority to review the Bureau decision. See Committee to Save WEAM v. FCC, 808 F.2d 113, 115-16 (D.C.Cir. 1986) (dismissal of petition warranted where appellant fails to exhaust administrative remedies by seeking review before full Commission of decision of FCC staff). It is

FURTHER ORDERED that petitioner's motion for stay and to hold this case in abeyance be dismissed as moot.

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D. C. Cir. Rule 41.

Per Curiam